IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZ ERA Auckland 294
5353766

	BETWEEN	LEN CLAPHAM Applicant
	A N D	ALEXANDER & CO LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Kevin Muir, Counsel for Applicant Daniel Erickson, Counsel for Respondent
Investigation meeting:	18 June 2012 at Auckland
Date of Determination:	27 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Clapham) alleges that he was unjustifiably dismissed by the respondent (Alexander & Co) when the latter disestablished his position making him redundant.

[2] Although it is disputed as to exactly which party contacted the other first, it is common ground that Alexander & Co developed a role especially for Mr Clapham and that an offer of employment was conveyed by Alexander & Co to Mr Clapham in a letter dated 10 May 2010. There was a family connection between the parties which encouraged the formation of the employment relationship.

[3] The role of business development manager was accepted by Mr Clapham which necessitated his resigning a chief executive role in Wellington and shifting to Auckland.

[4] An employment agreement came into force on 19 July 2010 and that agreement, inter alia, allowed Alexander & Co to terminate the agreement in the event of certain health events that might befall Mr Clapham and in respect of redundancy in

which case four weeks' notice would be given but no other compensation was payable.

[5] The employment agreement was permanent and not time-limited, although Alexander & Co says that its expectation was that the role would have a defined end because Mr Clapham had disclosed to it that he had a life-threatening illness for which he was receiving treatment. In consequence, Alexander & Co says that the role it designed had that in mind and contemplated a fixed list of tasks for Mr Clapham for what it says both parties accepted was a finite term.

[6] In the period from March 2011 down to the termination of the employment on 31 May 2011, Alexander & Co raised a number of matters with Mr Clapham concerning either his performance or his health status.

[7] In particular, a letter dated 24 March 2011 from Alexander & Co to Mr Clapham raised performance concerns. A response from Mr Clapham dated 15 April 2011 was positive in tone and conciliatory in its effects.

[8] Subsequently, there was an email from Alexander & Co to Mr Clapham dated 7 April 2011 in which Alexander & Co raised questions about Mr Clapham's health status. The email sought a "belt and braces" response from Mr Clapham's medical advisers as to his health status.

[9] Mr Clapham's response by way of letter to Alexander & Co was dated 20 April in which he pointed out first that he had provided full disclosure of his health status to Mr Alexander of Alexander & Co prior to his commencement of employment, a view which was also asserted by Mr Clapham in his formal application for employment at the time of engagement. Second, Mr Clapham noted that he had kept good health during the employment and he proposed to simply have his doctor confirm that he was fit for full time employment, without more. Mr Clapham indicated his view was that anything beyond that was an invasion of his privacy.

[10] An email from Alexander & Co dated 20 April 2011 responded to Mr Clapham and appeared to raise fresh performance concerns. However, the email concluded with the contention that Mr Clapham would be suspended from duty from 27 April 2011 unless and until he provided the full medical disclosure originally sought by Alexander & Co in its email of 7 April 2011.

[11] Mr Clapham failed to provide the fulsome disclosure of his health status as sought by Alexander & Co in its email of 7 April 2011 and subsequently on 30 May, Mr Clapham was effectively suspended from duty and dismissed for redundancy the following day.

[12] Mr Clapham says that the dismissal was a sham redundancy and, in addition, was completely bereft of any consultation. He alleges that the real reason for the dismissal was that he had survived longer than Alexander & Co had anticipated and that for whatever reason, Alexander & Co had developed concerns about his work performance.

[13] Those claims are all resisted by Alexander & Co which says that, first the financial fundamentals of the business started to deteriorate in late 2010 and that in the early part of 2011, the specific tasks that Mr Clapham had been employed to attend to were substantially completed and that by the beginning of May, virtually all of the tasks allocated to Mr Clapham were attended to.

[14] Furthermore, Alexander & Co says it became increasingly concerned about Mr Clapham's performance and his behaviour and considered that his ill health was affecting his performance and behaviour. It says it sought further assurances from Mr Clapham in respect of his health status because of those concerns but was rebuffed.

[15] Alexander & Co describes the meeting of 30 May 2011 as part of the ongoing redundancy consultation rather than a meeting to suspend Mr Clapham and it says that because there were no viable alternatives provided by Mr Clapham which would enable him to be gainfully employed into the future, Mr Clapham was legitimately dismissed for redundancy the following day.

Issues

[16] The Authority can conveniently deal with the matters in contention here by addressing two questions:

(a) Was this a genuine redundancy; and

(b) Did Alexander & Co adequately consult with Mr Clapham?

Was this a genuine redundancy?

[17] The Authority has no hesitation in concluding that this was not a genuine redundancy. At its best, the dismissal could be characterised as being activated by "mixed motives". The evidence for Alexander & Co was essentially that its expectation was that Mr Clapham would perish before there was any question of redundancy being necessary. Mr Stephen Alexander, the principal of Alexander & Co, told the Authority that notwithstanding that the employment agreement used was *"our standard employment agreement throughout … the work I required was nonetheless time limited"*.

[18] The evidence for the employer could not be plainer that it did not anticipate having to bring the employment relationship to an end because it thought that it would end naturally by the death of the incumbent. Mr Alexander's evidence to the Authority was that his researches, on the particular cancer that Mr Clapham suffered from, that life expectancy after diagnosis would suggest that *"even a six month work period might be optimistic …"*.

[19] Given that background then, the decision of Alexander & Co to use its standard form employment agreement is perhaps not altogether unsurprising; the context in which that standard form employment agreement was issued was an apparent expectation that whatever the employment agreement said, Mr Clapham would not be a long term employee.

[20] Mr Alexander also gave evidence of the need to *"rein in"* some of Mr Clapham's work habits and that resulted in the first email from Alexander & Co dated 25 March 2011, which the Authority has already referred to. Of course, as the Authority has already noted, Mr Clapham responded to that in a conciliatory way and appeared to accept that he needed to modify his behaviour. But it is the context around the next exchange that is more problematic in terms of the collapse of the parties' relationship. Because, again as the Authority has already noted, the next exchange commenced with the email from Alexander & Co dated 7 April 2011 in which it raised concerns about the health status of Mr Clapham and sought detailed information from his medical advisers about the nature of his condition and the prognosis. Mr Alexander told the Authority that the reason that it became necessary for him to seek this information was that the exchange of information from Mr Clapham to the employer had rather dried up with the end of the 2010 year.

Previously, Mr Alexander represented that Mr Clapham was very explicit about his health and what was going on but that from the beginning of 2011 onwards, that information became less and less fulsome to the extent that Mr Alexander became convinced that Mr Clapham's health was in part responsible for Alexander & Co's concerns about Mr Clapham's behaviour in the workplace.

[21] But of course Mr Clapham's view of this matter was different. He felt that he had provided full disclosure to Mr Alexander prior to the appointment being made, had taken virtually no sick leave during the employment and felt that the provision of further and better particulars to Mr Alexander was an invasion of his privacy.

[22] Whether that stance by Mr Clapham is an appropriate one in a good faith environment is beside the point because it was not on that basis that Mr Clapham was dismissed. His dismissal was for redundancy and it is absolutely plain on the evidence the Authority heard that Alexander & Co was, from the early part of 2011, concerned with Mr Clapham's performance and doubtful about his health and its potential impact on his performance.

[23] It may be that had Mr Clapham been more prepared to share information about his health and his medical advisers were able to confirm to Mr Alexander how long Mr Clapham could reasonably expect to continue working, that the dismissal (on whatever basis it is characterised) may not have happened because Alexander & Co may have been satisfied that Mr Clapham's tenure in the position was, indeed, limited. That aspect may go to contribution if a personal grievance is identified.

[24] But it is plain on the evidence that the Authority heard that Alexander & Co was concerned about Mr Clapham's performance and his health status in the last few months of the employment. The correspondence from Alexander & Co to Mr Clapham is completely inexplicable unless it is acknowledged that, at best, it was, at the time it says it was contemplating the need for redundancy, also concerned with performance and with health issues.

[25] The difficulty for Alexander & Co is that during the period that it was plainly anxious about performance issues and health issues, there is precious little evidence that redundancy was in contemplation. Certainly it is true that the business had suffered a downturn from the beginning of 2010 and that, in particular, as well as

work falling off, the number of billable staff members had reduced thus effectively reducing the firm's income.

[26] It is also true that the firm's accountant had told Mr Alexander that his non-chargeable salary's were too high. Under that head, came, amongst other people, Mr Clapham's salary.

[27] But there is absolutely no evidence that Alexander & Co made it clear to Mr Clapham that restructuring, reorganisation or retrenching were in contemplation. Mr Clapham's evidence, which the Authority accepts at face value, is that he was never told of any financial constraints and indeed, his evidence is that as one of his briefs was the firm's human resources, he would have expected to be told about retrenchments if that were in contemplation.

[28] Furthermore, Mr Clapham's evidence, again accepted by the Authority, is that he was never consulted about the prospect that his position might become redundant and he was simply handed a letter dismissing him for redundancy on 31 May 2011 and told to leave the building. Even Mr Alexander, when questioned by the Authority on the point, seemed to concede that the way in which the termination itself was effected was not in accordance with good employment law practice. Mr Alexander told the Authority that he thought *"a standard redundancy letter would have been officious and heavy handed"*.

[29] As the Authority indicated at the beginning of this section, at best, this factual matrix could be seen as an example of an employer acting with "mixed motives" but given the substantial evidence of Alexander & Co's reliance on the aspects other than the redundancy itself, the motives of the employer seem to be heavily weighted in favour of the other reasons for the dismissal. This is so particularly when the Authority finds no evidence of consultation and no evidence of any sharing of financial information about the turning down of the business (confirmed by Mr Alexander himself in a question from the Authority).

[30] Of course, the law on this kind of situation is clear. In *Rolls v. Wellington Gas Co Ltd* [1998] 3 ERNZ 116 at 123, the following passage is relevant:

> *The most eloquent piece of evidence is … the more or less contemporaneous presence – certainly the recent presence – of indications that termination of employment was being considered for other reasons altogether.*

[31] On the face of it, that observation of the Court is precisely on point here; Alexander & Co was becoming sufficiently concerned about other aspects of the employment that the redundancy aspect really played second fiddle, if indeed any part at all.

[32] In a more recent decision of the Authority, Member Arthur in *Rillstone v. Product Sourcing International 2000 Ltd*, AA167/07 at para.[34], had this to say:

> *Where the Authority finds "mixed motives" – such as genuine business reasons but with underlying personality or performance concerns – the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal.*

[33] In the present case, the Authority is not persuaded that Alexander & Co has discharged the burden by persuading the Authority that the redundancy was genuine and the predominant reason for the dismissal. On the facts the Authority heard, it seems much easier to conclude that redundancy was an afterthought, perhaps borne of frustration at the failure to get the medical information sought, but that the predominant driver was the developing anxiety about performance issues and the concern about the relationship between those performance issues and Mr Clapham's health status.

Was Mr Clapham adequately consulted?

[34] The evidence before the Authority is plain as can be that there was no consultation at all in respect of the purported redundancy. Mr Clapham gave evidence to that effect and was unshakeable in his view that the first that he knew of the redundancy was when he was presented with the letter alleging that he was redundant on 31 May 2011.

[35] As counsel for Mr Clapham correctly observe in their submissions, consultation is important in this case not just because of the common law duty but also because of a contractual duty. Mr Clapham's employment agreement at para.25.1 made it clear that where an employee was to be made redundant, four weeks' notice will be given **subject to the appropriate consultation process having been completed**.

[36] In the Authority's opinion, the failure by Alexander & Co to follow its own employment agreement as well as its failure to observe the consultation required by the law puts the matter beyond doubt. Really, this is a case where, for whatever reason, Alexander & Co simply lost patience with an employee and brought the employment to an end under the guise of a restructuring.

[37] In the absence of any paper trail of the sort that one would normally expect in a redundancy situation, in the absence of any evidence at all of consultation having taken place, in the absence of any evidence of the financial health of the business being shared with Mr Clapham, in the absence of any compliance with its own employment agreement concerning consultation, it is difficult for the Authority to not characterise this redundancy as a sham when, by all accounts, the first occasion that Mr Clapham became aware of his redundancy was when he was handed a sealed envelope which referred to that status for the first time.

[38] All of the documentation before the Authority between Mr Clapham and his employer seems to be concerned with other matters. There is no reference anywhere to redundancy save in the final letter of dismissal.

[39] Not only does Alexander & Co fail to observe the basic tenets of employment law in respect of the creation of a redundancy situation and fail to meet its own employment agreement requirements in terms of consultation, it also fails to fulfil its statutory obligation under s.4 of the Employment Relations Act 2000 (the Act).

[40] That section requires the provision of information to the employee who is affected by the employer's decision, in order that the employee can adequately participate in the employer's process. That obligation has recently been the subject of judicial analysis in *Massey University v. Wrigley [2011] NZ Emp C 37* wherein Judge Travis made clear that the law required the provision of information with sufficient particularity to enable the affected employee to adequately engage in the consultation process. In the present situation, the Authority has found as a fact that there was no consultation at all and so the statutory obligation is, by definition, breached. But one would have thought that a good and fair employer would have appreciated the propriety of complying with the law and providing the information that it had at its disposal in respect of the need for the restructure. The fact that no attempt was made to provide financial information to Mr Clapham, for example (confirmed in

Mr Alexander's evidence to the Authority), strongly suggests that the redundancy was a sham.

Determination

[41] The Authority is satisfied that Mr Clapham has proved his claim that he has suffered an unjustified dismissal. The defence advanced by Alexander & Co that this was a legitimate redundancy, is rejected by the Authority. Mr Clapham has satisfied the Authority that the redundancy was not a genuine one and was entirely without consultation or indeed any evidence of the sort of paper trail that would customarily be seen in a legitimate redundancy situation.

[42] As a consequence of the Authority's finding that Mr Clapham has simply been unjustifiably dismissed, he is entitled to compensation for the wrong done to him, the Authority having rejected Alexander & Co's defence that this was a genuine redundancy situation.

[43] However, before the question of remedies can be considered, the Authority is obligated by the statute to consider whether Mr Clapham has contributed in any way to the circumstances giving rise to his personal grievance. The Authority suggested earlier in this determination that Mr Clapham may have contributed to his personal grievance by his failure to properly respond to his employer's request for further and better particulars in respect of his health status. Had more fulsome evidence of his health status been provided, it is conceivable that the unjustified dismissal could have been avoided. But the logic of that proposition can only be taken so far because the evidence is that Alexander & Co failed absolutely to make it clear to Mr Clapham that the medical certificate that he did provide on 3 May 2011 was insufficient for Alexander & Co's purposes. Certainly, Mr Clapham might have expected a response from Alexander & Co given its previous demand that he provide more fulsome information than that which was actually supplied by him on 3 May 2011. But in fact Alexander & Co took no steps in that regard and there was no further significant contact between the principal protagonists from 3 May 2011 down to 30 May 2011 at which point Mr Alexander did confirm that he wanted further and better particulars about Mr Clapham's health status.

[44] But although Mr Clapham indicated during that meeting that he *"did not believe that* [Mr Alexander] *had any grounds for demanding further information*

about my health", he might well reflected on that statement and changed his position had he been given the chance to. In the result, he was dismissed the following day so, in the Authority's opinion, it would not be fair or just to hold Mr Clapham to have contributed to his personal grievance by failing to provide his employer with health information sufficient to satisfy Alexander & Co's request.

[45] That being the position, in order to resolve Mr Clapham's personal grievance, the Authority directs that Alexander & Co is to pay to Mr Clapham free of deduction the following sums:

(a) Compensation under s.123(1)(c)(i) of the Act in the sum of $12,000;

(b) Fourteen weeks' salary as claimed; and

(c) The Authority's filing fee of $71.56.

[46] In making the awards it does, the Authority considers that Mr Clapham has demonstrated the dramatic effect his sudden exit from the firm had on his sense of wellbeing and enjoyment of life. It is clear from his evidence that he was genuinely hurt and humiliated by the employer's precipitate action and, in consequence, the Authority considers that he is entitled to a significant award of compensation.

[47] In addition, it is plain from the evidence that Mr Clapham took all proper steps to mitigate his loss by seeking alternative employment promptly and notwithstanding his compromised health, he was successful in doing so. He is to be commended for those efforts. Notwithstanding that, he sustained lost income for a 14 week period, and in all the circumstances of this case, the Authority is minded to exercise its discretion by granting Mr Clapham reimbursement of that total 14 week sum.

Costs

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority